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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

TOUCHPOINT COMMUNICATIONS, LLC,
an Oregon Limited Liability Company; *dba*
WEO MEDIA, LLC,
Plaintiff,

vs.

DENTALFONE, LLC, a Florida Limited
Liability Company
Defendant

Case No.:

AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT, UNFAIR
COMPETITION, AND TORTIOUS
INTEFERENCE

INTRODUCTION

1. This is a civil action seeking a declaratory judgment, injunctive relief, and damages for misrepresentation under Copyright Act 17 U.S.C.A. §101 et seq., the Lanham Act 15 U.S.C.A. §1051 et seq., and under Revised Code of Washington – Unfair Business Practices Act. Rev. C. W. A. §19.86 et seq.

2. This case involves competitors in the field of Internet Dental Marketing.

3. This case arises from the defendant DentalFone’s (“DF”) improper assertion of copyright and trade dress infringement against plaintiff Touchpoint Communications, LLC, *dba* WEO

Media, LLC (“WEO”), mobile phone application “tile design” which is used to select various operating functions related to obtaining and managing personal dental services.

4. WEO brings this action to clarify the rights of the parties and to refute the defendant’s assertions of copyright and trade dress infringement.

5. Further WEO also seeks damages under the Copyright Act, the Lanham Act and Washington’s Unfair Trade Practices Act, in compensation for the defendant’s knowing and material misrepresentations with the sole attempt to limit competition in the field of Internet Dental Marketing

PARTIES

6. WEO Media is an Internet Dental Marketing company that conducts business in State of Washington, and is registered as “Touchpoint Communications LLC” *dba* WEO media, and is also registered and operates as WEO Media, LLC in the State of Oregon.

7. DentalFone, LLC, is an Internet Dental Marketing Company that conducts business in the State of Washington, and is organized in the State of Florida.

8. On information and belief, DF claims to own unregistered copyrights and trade dress rights in mobile phone application designs.

JURISDICTION AND VENUE

9. This action arises under the copyright laws of the United States, 17 U.S.C. §§ 101 et seq. This Court has subject matter jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331 and 1338, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

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1
2 10. This Court has personal jurisdiction over DF for the following reasons: DF intentionally
3 made unwarranted demands on WEO based on meetings in the State of Washington; DF issued
4 its copyright threat to WEO in connection with that meeting in the State of Washington; and, on
5 information and belief, DF conducts regular business in the State of Washington.
6

7 11. On information and belief, DF does substantial business in the State of Washington. By
8 marketing to and entering into licensing agreements with Washington based dental practices.
9

10 12. DF has provided internet marketing to Issaquah Valley Dental Care, located in Issaquah,
11 State of Washington, and whose website homepage which notes that the design and content are
12 copyrighted by DentalFone. Therefore, DF has an active commercial presence in the State of
13 Washington constituting continuous and systematic contacts with the forum.
14

15 13. Venue for this action is proper under 28 U.S.C. §1391(b)(2).
16

17 **FACTUAL BACKGROUND**

18 14. WEO's sole commercial focus is providing web-design and marketing through other
19 internet based media to dental practices throughout the United States. As a part of WEO's
20 comprehensive dental marketing services customers are provided custom website design, mobile
21 websites, search-engine optimization – among other services. WEO's software platform is highly
22 automated in an effort to provide the benefits of powerful marketing tools to its clients without
23 overburdening a client or its staff with a heavy administrative time commitment.
24

25 15. WEO is largely considered one of the leaders in internet dental marketing web design and
26 as such has seen its popularity and market share grow each year since its founding. This success
27 was part of the reason that WEO was invited to March 2014, conference for the Academy of
28 Osseointegration ("AO Conference") as a speaker. The AO Conference brings practitioners from

1 throughout the world to present the most recent methodologies and technologies related to
2 implant dentistry. WEO representatives first met DF at the AO Conference on or around March
3 6, 2014 at Seattle, WA. Prior to meeting DF at the AO conference WEO was unaware of DF's
4 existence. The following popular press releases in the State of Washington show that WEO has
5 developed and solidified its reputation as the premier web design firm for the dental services
6 industry within the State:
7

- 8 • **June 17, 2014** - (Tacoma, WA) - Burkhart Dental is widely recognized as one of the
9 leaders in the dental supply business by providing their dental clients with industry
10 leading service and high quality products. Burkhart has announced a partnership with
11 WEO Media to offer their marketing services to Burkhart's thousands of dentists across
12 the United States. Burkhart is excited to further demonstrate their commitment to
13 providing the best in dental products and services by promoting WEO Media's dental
14 marketing services.
15
- 16 • **November 14, 2013** - (Spokane, WA) - The Spokane District Dental Society has selected
17 WEO Media to build them a new website.
18
- 19 • **June 3, 2013** - (Kirkland, WA) - Seattle Study Club (SSC) has selected WEO Media to
20 be their exclusively endorsed company for websites and SEO (search engine
21 optimization) services to their thousands of members worldwide. WEO Media will be
22 constructing a new website and management platform for SSC.
23
- 24 • **June 7, 2012** - (Tacoma, WA) - Pierce County Dental Society selects WEO Media to
25 create a new website, and promotes WEO Media to their members.
26

27 ///

28 ///

- 1
- 2 • **November 30, 2011** - (Seattle, WA) - Seattle-King County Dental Society (SKCDS)
- 3 announces partnership with WEO Media. After thoroughly analyzing many dental
- 4 marketing companies the SKCDS chose to partner with and exclusively endorse WEO
- 5 Media due their superior services and outstanding value to dentists.
- 6
- 7 • **November 16, 2011** - (Vancouver, WA) - Clark County Dental Society picks WEO
- 8 Media to revamp their website, and promotes WEO Media to their members.
- 9

10 16. WEO is currently, and has been, one of the industry leaders in web-based marketing
11 throughout the United States and the State of Washington. Over the last six years WEO has
12 worked to develop its web-based marketing platform and reputation throughout the dental
13 industry.

14 17. WEO representatives first became aware of DF at the AO conference in March 2014,
15 located at Seattle, WA. This meeting was almost five years after the company was founded, and
16 at least three years after WEO had begun to do substantial business in the State of Washington.

17 18. On November 25, 2014 (“November Letter”), DF sent WEO a cease and desist letter
18 asserting its interest in the “unique and proprietary design” utilized on the websites and mobile
19 apps it creates. (EXHIBIT 1).

20 19. On March 4, 2015 (“March Letter”), DF sent WEO a second cease and desist letter
21 reasserting its interest in the “unique and proprietary design” utilized on the websites and mobile
22 applications it creates. (EXHIBIT 2).

23 20. The March Letter was also sent to Smiles Dental, a significant client of WEO. Smiles
24 Dental is based in the State of Washington, and has in excess of ten locations and growing
25 rapidly.
26
27
28

1
2 21. Approximately one month after receiving the March Letter, Smiles Dental terminated its
3 relationship with WEO.

4
5 22. DF asserts that its “unique and proprietary designs” is related to its use of tile based
6 visual web layout design (“Tile Base”) are subject to federal copyright and trade dress
7 protections. DF has no federal copyright or trade dress registrations related to its Tile Base.

8
9 23. Tile Base is neither new, original, nor novel. To wit: DF’s design is neither “unique” nor
10 “proprietary” as claimed in the November Letter and reasserted in the March letter.

11 24. wix.com (“wix”) is a leader in general small business web design. On December 25, 2012
12 – prior to DF’s initial filing with the Florida Secretary of State – wix published an article “5 Web
13 Design Trends to Watch Out for in 2013.” (“5 Designs”) Point four of this article points to the
14 popularity of the website “pinterest.com” as a result of its “masonry layout,” “tile layout” or
15 “brick layout.”(EXHIBIT 3).

16
17 25. The 5 Designs article also points out “Metro” a Microsoft Design Language which
18 utilizes a display of “...text based buttons, 2D blocks of flat, bright tiles that represent various
19 programs, are all a part of this design language.”(EXHIBIT 3).

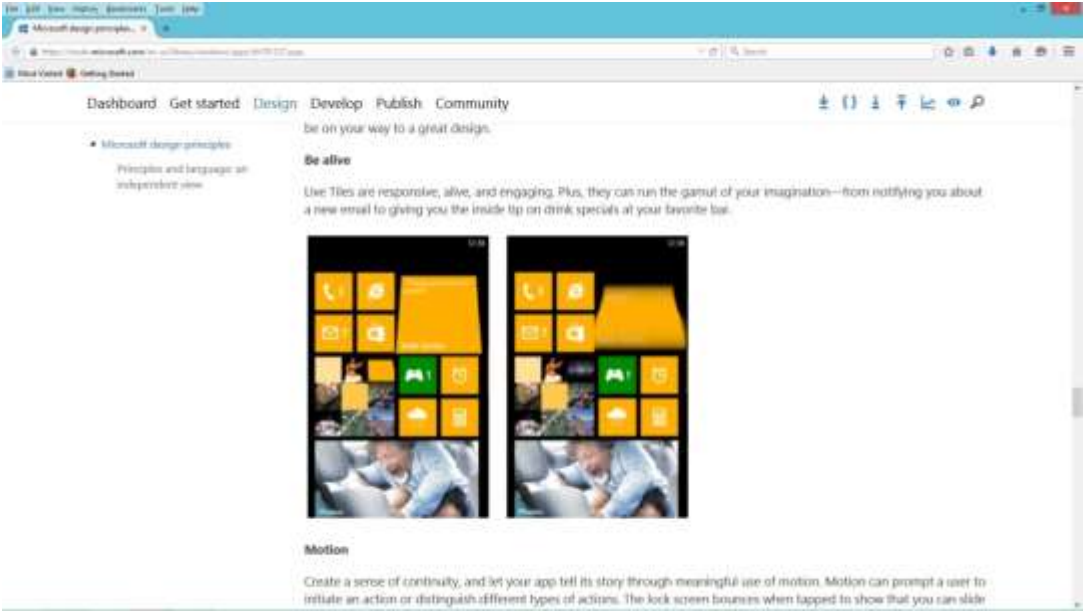
20
21 26. The ubiquitous use of tiles in web design and mobile application design is shown:

22 ///

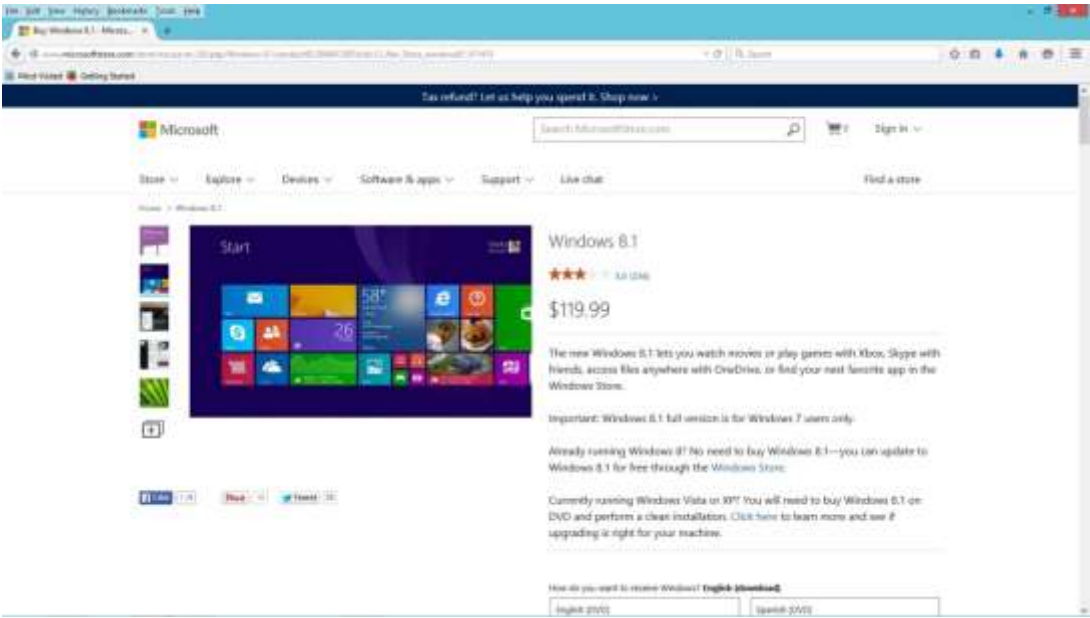
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Microsoft – Screenshot on Microsoft Design Principles Web Site



Microsoft – Microsoft 8.1 user interface

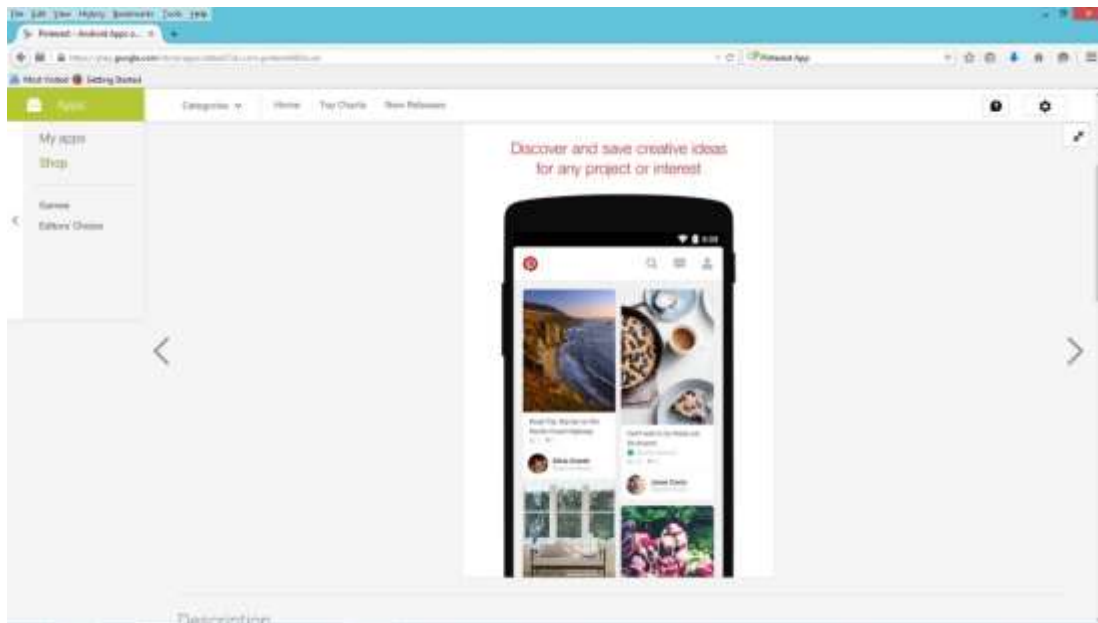


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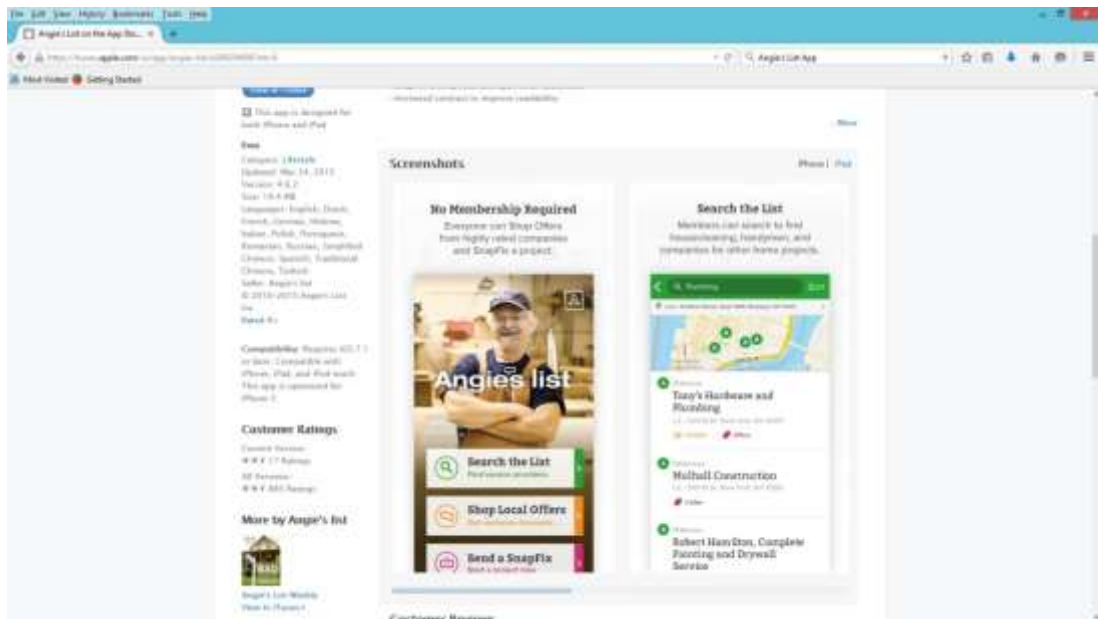
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Pinterest – Pinterest App Screenshot on Google Play Store



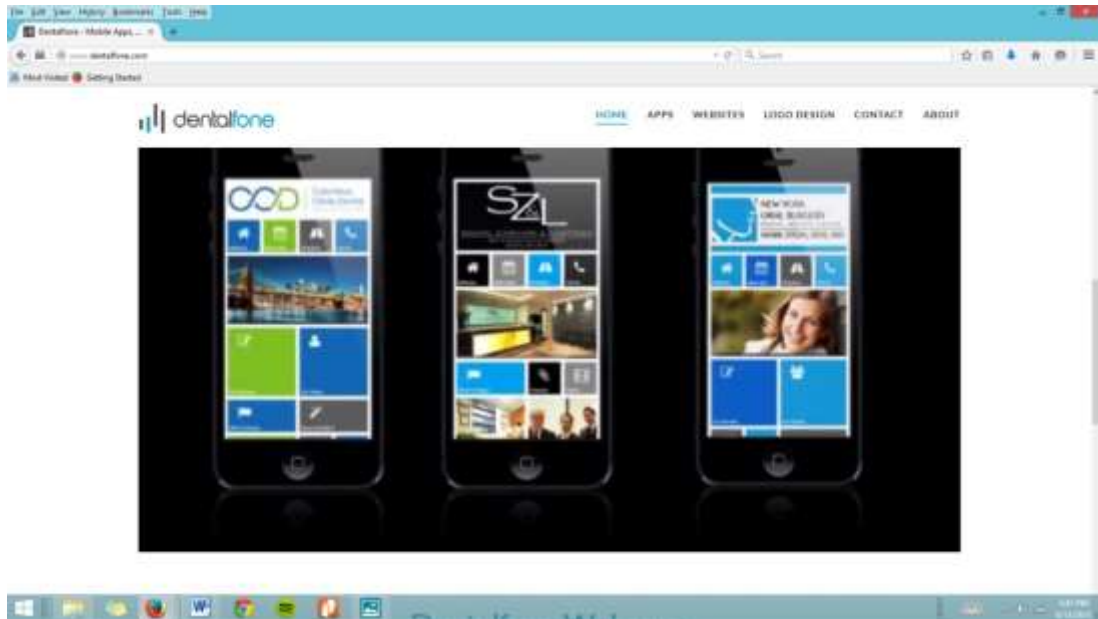
Angie's List – Angie's List App Screenshot on iTunes App Store



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27. DF's "unique and proprietary design" merely lays generic icons over live tiles, a standard approach to Tile Base design, is shown below:



COUNT I

DECLARATORY JUDGMENT OF NON-INFRINGEMENT UNDER THE COPYRIGHT ACT

28. WEO repeats and realleges each of the allegation set forth in paragraphs 1 through, and the same incorporated herein by reference.

29. In its November Letter, DF asserts that it is the exclusive owner of a valid copyright for its "unique and proprietary design"; this is reasserted in DF's March Letter.

30. DF's "unique and proprietary design" is little more than Tile Base design.

31. Tile Base design is ubiquitous in both web and mobile application design. DF is not the creator of Tile Base, nor has DF manipulated Tile Base design sufficiently for it to become an original work.

32. Tile Base was used in the web and mobile application development industry long before DF was founded in 2013.

33. DF has no rights under the Copyright Act related to tile based design due to its ubiquitous nature, failure to sufficiently manipulate the medium, and its use in mobile application design prior to the DF's 2013 founding.

34. Therefore, WEO did not infringe DF's alleged copyrighted material related to its Tile Base design.

COUNT II

DECLARATORY JUDGMENT OF NON-INFRINGEMENT UNDER THE LANHAM ACT

35. WEO repeats and realleges each of the allegation set forth in paragraphs 1 through 34, and the same incorporated herein by reference.

36. In its November Letter, DF asserts that its "unique and proprietary design" is protected under the Lanham Act's trade dress protections; this is reasserted in DF's March Letter.

37. DF's "unique and proprietary design" is little more than Tile Base design.

38. Tile Base design is ubiquitous in both web and mobile application design. Therefore, DF's "unique and proprietary design" is not unique, nor it is proprietary. Furthermore, no reasonable consumer would associate the Tile Base design DF uses as a source identifier.

39. Tile Base was used in the web and mobile application development industry long before DF was founded in 2013.

///

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1
2 40. DF has no rights under the theory of Trade Dress related to tile based design due to its
3 ubiquitous nature, its lack of efficacy as a source identifier, and its use in mobile application
4 design prior to DF's 2013 founding.
5

6 41. Therefore, WEO did not infringe DF's alleged Trade Dress related to its Tile Base
7 design.
8

9 **COUNT III**

10 **UNFAIR TRADE PRACTICES**

11 **R.C.W.A. §19.86**

12 44. WEO repeats and realleges each of the allegation set forth in paragraphs 1 through 41,
13 and the same incorporated herein by reference.

14 45. In its November Letter, DF asserts that it is the exclusive owner of a valid copyright, and
15 protected under the Lanham Act's trade dress protections for its "unique and proprietary design";
16 these allegations are reasserted in DF's March Letter.
17

18 46. DF's "unique and proprietary design" is little more than Tile Base design.

19 47. Tile Base design is ubiquitous in both web and mobile application design. DF has not
20 manipulated Tile Base sufficiently to constitute an original work as required for copyright
21 protection. Additionally, the ubiquity of Tile Base across platforms and operating systems
22 renders it ineffective as a source identifier, and thus, it is not protectable under the theory of
23 trade dress.
24

25 48. Tile Base has been used in the web and mobile application development industries prior
26 to DF's 2013 founding.

27 ///
28

1
2 49. DF has attempted to unfairly remove competition from the marketplace through its
3 November Letter and March Letter in which it misrepresents its ownership of intellectual
4 Property related to Tile Base design.
5

6 **COUNT IV**

7 **TORTIOUS INTERFERENCE**

8 50. WEO repeats and realleges each of the allegation set forth in paragraphs 1 through 49,
9 and the same incorporated herein by reference.
10

11 51. WEO had an ongoing relationship with Smiles Dental, in fact, Smiles Dental held the
12 work of WEO in high regard.

13 52. DF was aware of the relationship between WEO and Smiles, as indicated by the March
14 Letter.
15

16 53. DF, by and through their agent, intentionally sent the March Letter to Smiles Dental with
17 the goal of disrupting the relationship between WEO and Smiles Dental, and to acquire Smiles
18 Dental as a client.

19 54. Since DF has failed to file for trade dress rights with the USPTO or register for
20 copyrights with the U.S. Copyright office, its March Letter lacked a good faith basis for the
21 assertion.
22

23 55. Smiles Dental acknowledged receipt of the March Letter, and reacted negatively.

24 56. Very shortly thereafter, Smiles Dental subsequently terminated their relationship with
25 WEO.
26

27 57. Due to WEO's high retention rate of dental marketing clients it is not unusual to expect a
28 given client relationship to last in excess of seven years.

58. DF's letter disrupted the relationship between WEO and Smiles Dental resulting economic harm to WEO.

PRAYER FOR RELIEF

ON ALL COUNTS

1. WEO seeks declaratory judgment that it has not infringed the DF copyrighted works.
2. WEO seeks declaratory judgment that it has not infringed DF's trade dress.
3. A temporary restraining order, preliminary and permanent Injunction against DF from asserting any future claims under the Copyright Act and/or The Lanham Act related to its use of Tile Base design in its web design or mobile application development.
4. Damages amounting in excess of seven-hundred thousand dollars (\$700,000.00)
5. An award of Attorney fees under 17 U.S.C. §501 and/or the Lanham Act.
6. An award of interest and costs of this suit;
7. Any and all other appropriate nondiscriminatory measures to overcome the above described actions of DF;
8. Such other and further relief as the Court deems appropriate based on the misrepresentations by DF of their intellectual property rights.

Dated: April 16, 2015

s/ J. Curtis Edmondson

J. Curtis Edmondson
Attorney for Plaintiff
Touchpoint Communications, LLC

EXHIBIT 1



McCormick, Paulding & Huber LLP
Intellectual Property Law

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Hartford, CT and
Springfield, MA

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John C. Hilton*

Trademark Specialist
Mallory Hein*

November 25, 2014

VIA FEDEX

WEO Media
5331 SW Macadam Ave
Suite 354
Portland, OR 97239

Re: Infringement of Dentralfone Mobile Applications and Website
(Our File No. 8380-0005)

Dear Sir or Madam:

Our law firm represents Dentralfone, LLC ("Dentralfone"), in intellectual property matters.

As you know, Dentralfone creates websites and mobile applications for its clients using a unique and proprietary design ("Dentralfone design") that was exclusively developed by Dentralfone. Dentralfone's clients and others in the dental industry recognize the uniqueness of Dentralfone's design and as a result Dentralfone must maintain the identity and goodwill of its intellectual property rights related to the Dentralfone design.

We have become aware that you are designing websites and applications in the dental field that infringe the intellectual property rights in the Dentralfone design. In particular, we are concerned with the product shown in the enclosed screenshot ("Infringing Product"), we believe you have previously reviewed Dentralfone's materials and consider your product to be a direct copy.

The purpose of this letter is to inform you that Dentralfone's website and mobile app products are protected by copyright under 17 U.S.C. § 102. As the design of your Infringing Product is a substantially similar copy of Dentralfone's design continued use of the Infringing Product constitutes infringement of Dentralfone's rights. We note that the striking similarities between your product and the Dentralfone design first occurred shortly after you had access to the Dentralfone design at the AO Meeting in Seattle and had detailed discussions with Dentralfone regarding Dentralfone's product design, pricing and benefits.

WEO Media
8380-0005
November 25, 2014
Page 2

In addition, Dentalfone's design is protected by trade dress rights under common law. Dentalfone, through its customers and participation in numerous tradeshows and other events, has developed recognition in the marketplace as the source of the unique Dentalfone design. The design of your Infringing Product copies the overall "look and feel" of the Dentalfone design and, therefore, is likely to cause confusion as to the source of the Infringing Product. Accordingly, your sale of the Infringing Product constitutes trade dress infringement under 15 U.S.C. § 1125(a). Dentalfone must preserve the uniqueness and signifying nature of its design, and is strongly opposed to any uses which generate the appearance that Dentalfone had authorized and sponsored such uses.

In view of the foregoing, we must demand that you immediately cease and desist from making and/or selling the Infringing Product and any other products that infringe Dentalfone's intellectual property rights and remove any and all infringing uses of the Dentalfone design from any websites and/or applications including but not limited to images of the Infringing Product. We hope that you will understand Dentalfone's position in making this demand. Dentalfone is not litigious by nature, but must protect its investment in intellectual property. Accordingly, we hope that WEO will agree to the foregoing so that both parties can avoid the cost and aggravation of litigation.

We would appreciate WEO's written confirmation of compliance with Dentalfone's requests by **December 9, 2014**. In the event we fail to hear from WEO, we will advise Dentalfone to consider all legal remedies available to it.

Very truly yours,

McCormick, Paulding & Huber LLP

By Wm. Tucker Griffith / MSH
Wm. Tucker Griffith

TG/MSH/sbv
Enclosure

smiles dental™

love your smile™



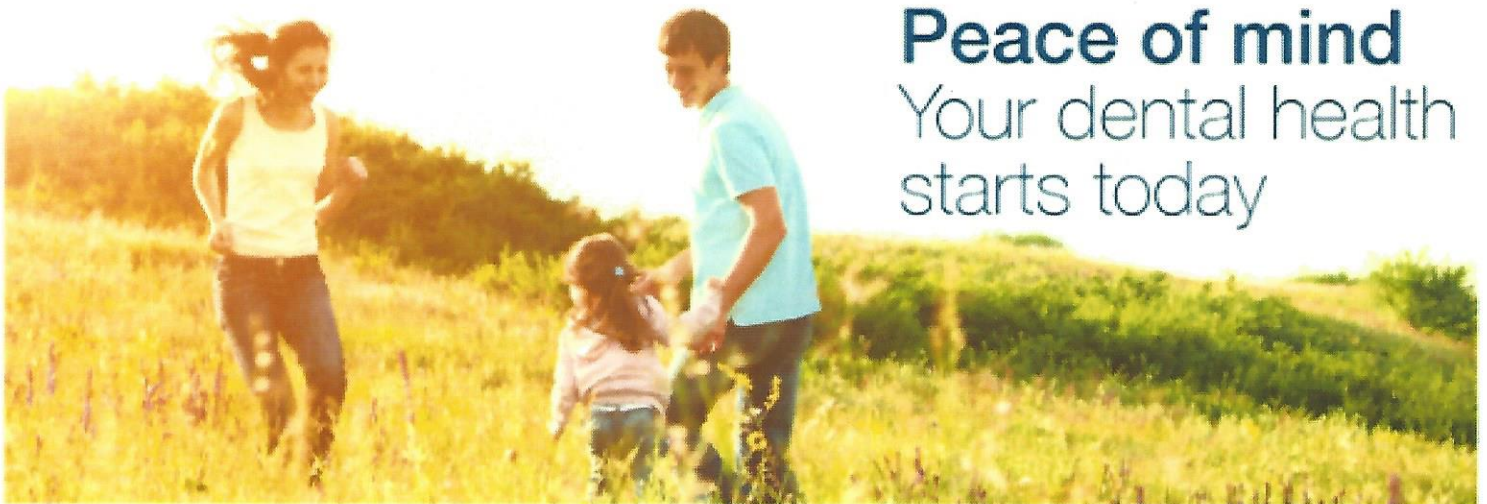
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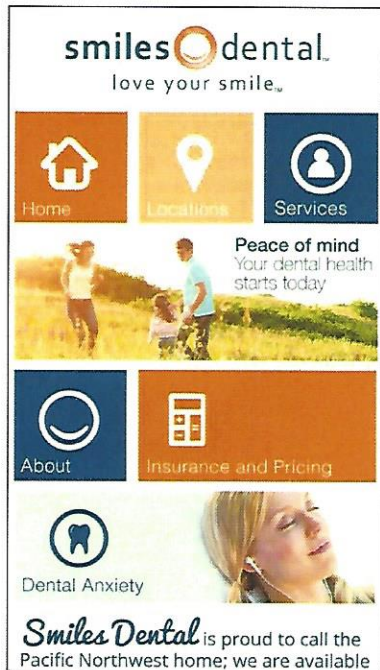
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Depending on where you live websites are accessed by mobile devices between 25% to 50% of the time. Now more than ever it is really important to have a mobile optimized website. Our mobile website service leverages your main website so all updates to your main website automatically transfer to your mobile website.

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WEO Media is an authorized domain registrar:
Registrant's Benefits and Responsibilities | ICANN Registrant Education

WEO Dental | www.weodental.com | (888) 788-4670
PO Box 2310, Portland, OR 97208

EXHIBIT 2



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Trademark Specialist
Mallory Hein*

March 4, 2015

VIA FEDEX

WEO Media
5331 SW Macadam Ave
Suite 354
Portland, OR 97239

Re: Infringement of Dentalfone Mobile Applications and Website
(Our File No. 8380-0005)

Dear Sir or Madam:

Our law firm represents Dentalfone, LLC ("Dentalfone"), in intellectual property matters.

As you know, Dentalfone creates websites and mobile applications for its clients using a unique and proprietary design ("Dentalfone design") that was exclusively developed by Dentalfone.

We previously informed you of Dentalfone's rights by letter dated November 25, 2014. In reference to that letter, Dentalfone remains very concerned with your continued use of the Infringing Product (see enclosed screenshot) coupled with your failure even to acknowledge our prior notice of infringement.

The purpose of this letter is to reiterate that your continued use of the Infringing Product constitutes infringement of Dentalfone's copyrights and trade dress rights in the Dentalfone Design. Moreover, inasmuch as Dentalfone has previously provided you with notice of such infringement, any continued use by you of the Infringing Product constitutes willful infringement of Dentalfone's Design.

In view of the foregoing, we must again demand that you immediately cease and desist using the Infringing Product and any other products that infringe Dentalfone's intellectual property rights. Due to your previous failure to respond to Dentalfone's notice of infringement, we have advised Dentalfone to consider its legal options. If you persist in infringing Dentalfone's rights, Dentalfone shall have to resort to all legal recourse available to it.

WEO Media
8380-0005
March 4, 2015
Page 2

We hope that you will understand Dentalfone's position in making this demand. Dentalfone is not litigious by nature, but must protect its investment in intellectual property. Accordingly, we hope that you will agree to the foregoing so that both parties can avoid the cost and aggravation of litigation.

We would appreciate your acknowledgement of and response to Dentalfone's requests no later than March 18, 2015. In the event we fail to hear from you, we will vigorously pursue appropriate legal remedies.

Very truly yours,

McCormick, Paulding & Huber LLP

By 
Wm. Tucker Griffith

TG/MSH/aer
Enclosures

cc: Smiles Dental - Via FedEx

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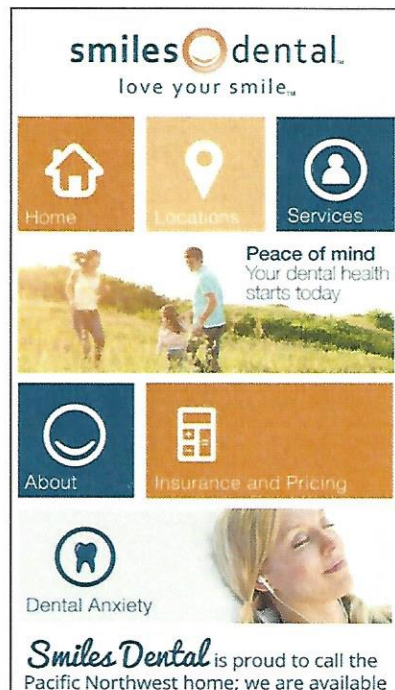
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Take Advantage of Mobile Internet Searches for Dentists!

Depending on where you live websites are accessed by mobile devices between 25% to 50% of the time. Now more than ever it is really important to have a mobile optimized website. Our mobile website service leverages your main website so all updates to your main website automatically transfer to your mobile website.

Once your dental website is launched, we will continue to work with you to maintain, promote, and update the website for years to come. We have launched hundreds of websites all across the country and we would love for your dental practice to be next. Please [contact us](#) today.

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WEO Media | www.weodental.com | (888) 788-4670
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EXHIBIT 3

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5 Web Design Trends to Watch Out for in 2013

December 25th 2012 | Design Inspiration

2012 was an amazing year in digital design. With the world of mobile and tablets growing in exciting and often unpredictable directions, the web continues to dynamically transform the way we think and interact. New ideas and fresh solutions are constantly coming to life, changing the digital landscape and defining new styles. With so much “new” happening, 2013 is sure to invite in some thrilling new trends. Exciting things are right around the corner, and we can’t wait for the year to start!

As we venture into 2013, here’s a list of 5 hot web design trends you need to know about.

Spell It Out With Designed Typography

Typography has been freed! The dominance of fonts like Arial, Verdana or Times New Roman has significantly decreased in recent years, inviting the use of creative custom fonts. By today and into 2013, typography is becoming an integral part of any web design, determining the way information is represented, enhancing messages and adding subliminal meaning. Next year, we’re expecting to see designs that use custom typography to enrich websites, often replacing the use of images.



Unique typography work on a Wix template

Skeuomorphism – You Know You Like It

This complicated word is actually something you encounter on a daily basis. Skeuomorphism is a design style that imitates an artifact or a material. In other words, it means making things look like other things. In the digital world, Skeuomorphism has been widely used on iOS. The iPhone calculator app, for example, literally looks like a real-world calculator. Same goes for the Notes app which looks like a regular old yellow notepad, complete with lines, margins and all. This approach is part of the reason that Apple products feel so natural and intuitive to use. Skeuomorphism will continue into 2013 and you can expect to see plenty of real life objects making their way into the digital experience.

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Skeuomorphism – Using a blackboard theme for the site layout

It's Metro Time

"Microsoft Design Language", aka "Metro", is the new wave sweeping across web design. Solid color combinations, text-based buttons, 2D blocks of flat, bright tiles that represent various programs, are all part of this design language. Metro was partly inspired by signs commonly found at public transport systems and partly by the principals of classic Swiss graphic design. It is minimalist, sporting an interface that goes back to the basics and offers simple, uncluttered environments to users.

Metro design is basically the opposite of Skeuomorphism, presenting elements that look nothing like real life. In the coming year, Windows 8 will become much more common in our technological surroundings, and we expect to see this design approach influencing the way people design and think the web.

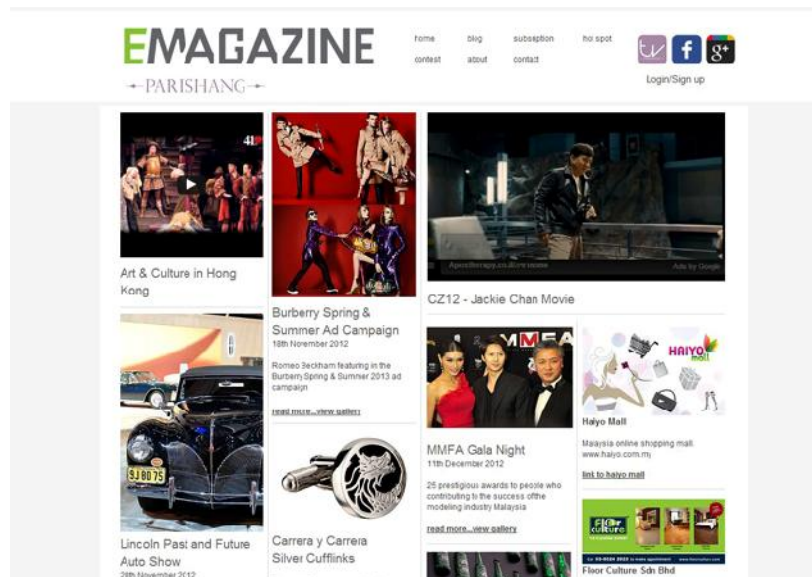


Januarycreative's Website Demonstrates How To implement 'Metro' Design in a Website

Pinterest Layout Tiles the Web

Pinterest burst into huge popularity in late 2011 and the past year in web design was largely influenced by the clean, orderly look of the dynamic grid layout. Additional names for this layout include "masonry layout", "tile layout", or "brick layout". A main characteristic of this design arrangement is that each tile has dynamic size, whether in width or height, and all tiles are ordered to fill in every blank space available. On a

Pinterest board, each tile has a dynamic height while all the tiles are always in the same width. The content, largely composed of images, is presented on a scrolling collage that clearly de-emphasizes text. The focus here is on beautiful images, placed into sticky-note sized blocks. With the great success Pinterest is enjoying, this trend is expected to grow and develop well into 2013.



Wix website inspired by the Pinterest layout

More Custom Photography & Illustrations

Stock photos of cliché or overused metaphors are out (unless you use them ironically). Authentic and innovative images are becoming a vital part of any successful site. Our tech savvy eyes have grown mature as we're moving away from all too familiar images of pretty people with perfect teeth. Original photos of a company's employees or team members are welcome, as well as captivating images of your building or facilities, or images of real life people using you products. Custom hand-drawn illustrations and designs are great as well, as the combination of digital design with hand crafted art never gets old. 2013 will be filled with real-life images and unique visuals, even cooky ones like this:



"Plastic Ladies" using custom photography on their Wix site

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